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No. 75-870

In the Supreme Court of the United States

OCTOBER TERM, 1975

FORD MOTOR COMPANY, APPELLANT

v.

WILLIAM T. COLEMAN, JR.,
SECRETARY OF TRANSPORTATION, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

MOTION TO DISMISS OR AFFIRM

ROBERT H. BORK,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

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Pursuant to Rule 16 of the Rules of this Court, appellees move to dismiss the appeal or, in the alternative, to affirm the judgment of the district court.

On March 13, 1975, the Administrator of the National Highway Traffic Safety Administration ("NHTSA") notified appellant of his initial determination, following an investigation, that the front seat-back brackets on appellant's 1968 and 1969 Mustang and Cougar automobiles were subject to failure that could result in rearward collapse of the seat and consequent loss of vehicle control, accident, or injury

(J.S. App. 7A–8A). After appellant presented rebuttal arguments and data to NHTSA, the Administrator notified appellant on August 12, 1975, that the seat-back defect in the 1968 and 1969 Mustangs and Cougars "relates to motor vehicle safety" within the meaning of the National Traffic and Motor Vehicle Safety Act of 1966, 80 Stat. 718, as amended, 15 U.S.C. 1381, *et seq.*, and ordered appellant to notify owners, purchasers, and dealers of the defect and to remedy the defect without charge (J.S. App. 8A).

Appellant commenced this action in the district court on August 18, 1975, challenging the constitutionality of those provisions of the Act that provide for civil penalties if a person fails to comply with an order directing notification and remedy of a safety-related defect. Appellant sought a temporary restraining order, preliminary and permanent injunctive relief, and the convocation of a three-judge court pursuant to 28 U.S.C. 2282 (J.S. App. 8A). A single district judge issued a temporary restraining order (*ibid.*), and a three-judge court was thereafter convened. At the hearing on appellant's motion for a preliminary injunction, the three-judge court continued the temporary restraint until further order (*ibid.*).

Appellant argued in the district court that the penalty provisions of the Act violate the Due Process Clause of the Fifth Amendment, contending that they impermissibly deter persons from seeking judicial review of the Administrator's orders by requiring a choice between complying with an order that may be erroneous and challenging the order in court

at the risk of incurring substantial civil penalties. Appellant claimed that it was entitled, under the Due Process Clause, to a "risk-free" opportunity to challenge the Administrator's order in court, and that the time for compliance with the order should begin to run only after a final judicial determination of that challenge.

The three-judge court, with one judge dissenting, rejected appellant's constitutional contentions, holding that the Act provides a constitutionally adequate procedure for tolling the accrual of civil penalties during the pendency of an action to enforce an order directing notification and remedy of a safety-related defect (J.S. App. 10A–25A). The court accordingly denied appellant's motion to enjoin the operation of the penalty provisions as unconstitutional (J.S. App. 1A, 25A). This appeal challenges that ruling.

In the meantime, the government had instituted a separate action in the district court to enforce the Administrator's order and to impose civil penalties for non-compliance. The three-judge court, "in the exercise of its pendent jurisdiction," issued "a preliminary restraint" enjoining the accrual of penalties for non-compliance with the Administrator's order "pending ruling by the District Court in the enforcement action on plaintiff's timely application in that action for a preliminary injunction" against accrual of penalties *pendente lite* (J.S. App. 25A).

On February 18, 1976, the district court in the enforcement action granted appellant's motion and preliminarily enjoined the government from imposing civil penalties on appellant on account of non-compli-

ance with the Administrator's order (App., *infra*, pp. 11–12).[1]

1. The appeal should be dismissed. Appellant has obtained, through the preliminary injunction in the enforcement action, essentially all the relief to which it would be entitled if it prevailed in the present action. Appellant "seeks only to restrain the operation of the civil penalty provisions of the Act" (J.S. 6), so that it may be assured "an adequate opportunity * * * for 'safely testing' the validity of the Administrator's order" (J.S. 15). The district court's preliminary injunction in the enforcement action has precisely that effect. Appellant is no longer "exposed to civil penalties in that action" (J.S. 5), and the allegedly coercive force of the challenged penalty provisions (see J.S. 6, 9, 17–19) has accordingly been vitiated.

Even if there remains a case or controversy within the meaning of Article III, the abstractness of the questions presented by the appeal makes this an inappropriate vehicle for constitutional adjudication. "Problems of prematurity and abstractness may well present 'insuperable obstacles' to the exercise of the Court's jurisdiction, even though that jurisdiction is technically present." *Socialist Labor Party* v. *Gilligan*, 406 U.S. 583, 588. See also *Rescue Army* v. *Municipal Court*, 331 U.S. 549; *DeBacker* v. *Brainard*, 396 U.S. 28. As in *Socialist Labor Party*, "the present

[1] The government's motion for reconsideration of the preliminary injunction was denied by the district court on March 11, 1976. The Solicitor General has determined not to take an interlocutory appeal from the order of preliminary relief.

posture of this case raises just such an obstacle" (406 U.S. at 589). There is no need to adjudicate the constitutional validity of the Act's penalty provisions at the instance of a litigant who has already obtained injunctive relief under the terms of those provisions and who therefore is no longer subject to the alleged deprivation of due process.[2]

[2] Appellant argues (J.S. 19–22) that the due process clause is also violated by the Act's provision authorizing the imposition of civil penalties for failure to comply with an administrative order directing a manufacturer to issue, pending completion of an enforcement action, "provisional notification" of a safety defect. 15 U.S.C. (Supp. IV) 1415(b). The Act does not provide a procedure for restraining the enforcement of such an order. But, since the Administrator has neither issued nor threatened to issue a provisional notification order in connection with the seat-back defect, the three-judge district court correctly concluded that "the provisional notification provision is not ripe for constitutional attack here" (J.S. App. 10A, n. 21). The court stated (*id.* at 11A; footnote omitted):

"In the absence of agency implementation of this section of the Act, we have no basis for determining its reach, let alone for measuring it against the command of the Constitution. The Administrator may view his authority to order provision[al] notification as limited to emergency situations—where the defect can be correlated with a significant incidence of highway accident and injury. The mere possibility that the Administrator might exercise that power in this case is too speculative to warrant judicial consideration at this juncture."

Although, as appellant argues, "the Administrator can order the provisional notification at any time" (J.S. 20), it does not follow that the prospect of a penalty for failure to comply with such an order has "a present, operative effect" (J.S. 21) of deterring litigation. See *Toilet Goods Ass'n* v. *Gardner*, 387 U.S. 158, 163–164. Not until the Administrator actually orders provisional notification will "the impact of the [penalty provision] * * * be felt immediately by those subject to it" (*id.* at 164). The time to challenge the provision is "in the context of a specific application," not "in the framework of the generalized challenge made here" (*ibid.*).

Appellant will suffer little if any "actual hardship" as a consequence of a dismissal. *Poe* v. *Ullman,* 367 U.S. 497, 509 (plurality opinion). In connection with the seat-back order, which formed the basis of the present constitutional attack on the statute, appellant is already free to litigate its validity without risk of civil penalty for non-compliance. If the Administrator of NHTSA issues notification and remedy orders in other cases, appellant can seek to restrain the enforcement of those orders, and thereby preclude the imposition of penalties *pendente lite,* either in an enforcement action brought by the government or in a pre-enforcement action brought by appellant (see J.S. App. 16A–18A), and on either statutory or constitutional grounds.[3]

2. Alternatively, the judgment of the district court should be affirmed. The Constitution does not prohibit the imposition of statutory civil penalties for non-compliance with an administrative order, if the accrual of penalties may effectively be stayed by a court of equity during the course of a judicial challenge to the administrative order. *St. Regis Paper Co.* v. *United States,* 368 U.S. 208, 226–227; *Yakus* v. *United States,* 321 U.S. 414, 438; *St. Louis, Iron Mountain & Southern Railway Co.* v. *Williams,* 251 U.S. 63, 64–65.[4] As the district court stated (J.S. App. 11A–12A):

> Ford's contentions carry the infirmity of causing the Constitution to forbid Congress from placing barriers in the path of insubstantial litigation, embarked upon for delay and in the hope that an agency may settle for less protection for the public than the law contemplates. In our view, and our reading of the cases, the basic constitutional requirement is satisfied if the manufacturer has an opportunity to convince a court that its ground[s] for contesting the validity of the order are substantial, and the adequacy of that opportunity is established where it is made available before liability for noncompliance attaches.

The district court correctly concluded that the Act provides a constitutionally adequate procedure for tolling the accrual of penalties during litigation. Under 15 U.S.C. (Supp. IV) 1415(*c*)(1), the district court is authorized to restrain "the enforcement of * * * an [administrative] order"—and thereby to toll the accrual of civil penalties—"if it determines, (A) that the failure to furnish notification is reasonable, and (B) that the manuacturer has demonstrated that he is likely to prevail on the merits." As the district court stated, "the statute, fairly read, permits the manufacturer who has a substantial, nonfrivolous challenge to the validity of the Administrator's deter-

[3] In an action brought by the government to enforce a notification and remedy order with respect to a defect in windshield wiper systems on 1971–1973 Capri automobiles, appellant sought and obtained, under the terms of the statute, a preliminary injunction against enforcement of the administrative order *pendente lite*. *United States* v. *Ford Motor Co.*, D. D.C., Civil Action No. 76–0029, January 19, 1976. The result in that case, as in the seat-back case, is that appellant has been left free to challenge the lawfulness of the administrative order without risk of incurring the civil penalties whose constitutional validity is at issue here.

[4] Moreover, due process would permit the imposition of penalties, even in the absence of an opportunity to obtain a stay pending the conclusion of litigation, if that were "justified by compelling public interest." *Yakus* v. *United States*, *supra*, 321 U.S. at 442.

mination to obtain a preliminary injunction either in the Government's enforcement suit or, if the Government does not act promptly in bringing such a suit, in a pre-enforcement action" (J.S. App. 11A).

Appellant's contention that requiring the manufacturer to demonstrate a likelihood of success on the merits imposes an impermissibly heavy burden (J.S. 14–15) was correctly answered by the district court (J.S. App. 19A):

> That burden is in substance no different from the showing generally required of litigants seeking to restrain the operation of a statute or regulation which, it is claimed, invalidly restricts their actions. Ordinarily, the statute or regulation is presumed valid, and regardless of the injury claimed to flow from the statute's operation, a preliminary injunction will not issue unless probable success on the merits is demonstrated.

It is true that when the manufacturer is unable to demonstrate a likelihood of success on the merits, it will have to choose between compliance on the one hand and litigation subject to the risk of civil penalties on the other. But "Congress laid great stress on the importance of a 'timely remedy,' to give the driving public the quickest possible notice and remedy of safety-related defects" (J.S. App. 24A–25A, n. 46); "insofar as the statute does not give the manufacturer a 'free ride'—to litigate without any risk of penalties—it advances the important public policy, embodied in the 1974 amendments [to the Act], of a 'timely remedy', and prompt adjudication of controversies relating to highway and motor vehicle safety"

(J.S. App. 24A). "The public interest embraces measures to add a surcharge to deter frivolous litigation" (J.S. App. 25A).

It is therefore respectfully submitted that the appeal should be dismissed or, alternatively, that the judgment of the district court should be affirmed.

ROBERT H. BORK,
Solicitor General.

MARCH 1976.

APPENDIX

In the United States District Court for the District of Columbia

UNITED STATES OF AMERICA, PLAINTIFF

v.

FORD MOTOR COMPANY, DEFENDANT

Civil Action No. 75–1345, filed February 18, 1976, James F. Davey, Clerk

FINDINGS, CONCLUSIONS, AND ORDER

This case involves automobiles which have been manufactured, and on the road, for periods of from seven to eight-and-a-half years. There were a total of 725,000 automobiles, that up to the first of this year had traveled approximately 60 billion miles.

At this time, the evidence shows that, considering the number of cars, the mileage, and the number of years they have been in operation, there have been relatively few accidents, no deaths or serious bodily injury attributable to seat pin failures.

Based on that background, and the evidence as it exists today, this Court finds that defendant Ford Motor Company ("Ford") was ordered by the National Highway Traffic Safety Administration ("NHTSA") to furnish notification to car owners in this matter, without being afforded anything that approached a due process hearing; that under the circumstances and the evidence available at the time of the notice, the manufacturer acted reasonably in refusing to comply with the demand of notification.

The Court also finds that the manufacturer has a substantial basis for challenging the administrative directive, and the Court finds that Ford has met its burden of proof to show that it is likely to prevail on the merits in a trial *de novo*.

Now, Therefore, upon Ford's motion for preliminary injunction pursuant to Section 155(c)(1) of the National Traffic and Motor Vehicle Safety Act of 1966, as amended (the "Act"), 15 U.S.C. § 1415(c)(1), the Court having heard and considered the evidence and arguments of counsel in support of and in opposition to Ford's motion, it is this 18th day of February, 1976,

Ordered that Ford's motion for preliminary injunction is granted, and that the plaintiff, its subordinates, employees, agents, and assigns, and each of them, are hereby enjoined from enforcing Sections 108, 109, 152, and 155 of the Act, 15 U.S.C. §§ 1397, 1398, 1412, and 1415, insofar as those sections purport to authorize the imposition of civil penalties upon Ford as a consequence of its failure to accede to the directive issued on or about August 12, 1975, by the Administrator of NHTSA which ordered Ford (i) to give notice to all owners of certain 1968 and 1969 model year Mustangs and Cougars of his final determination that the breakage of a seat back pivot arm hinge pin bracket constitutes a defect which relates to motor-vehicle safety within the meaning of the Act, and (ii) to offer to replace said seat pins free-of-charge to all present owners; *provided,* however, that nothing herein shall be deemed to restrain the plaintiff from prosecuting the instant civil action.

/s/ GEORGE L. HART, JR.
United States District Judge

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